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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 35.

FRANK CARLSON, MIRIAM CHRISTINE STEVENSON, DAVID HYUN, and HARRY CARLISLE, *Petitioners*,

v.

HERMAN R. LANDON, District Director of Immigration and Naturalization Service.

No. 136.

JAMES W. BUTTERFIELD, Director of Immigration and Naturalization Service, *Petitioner*,

v.

JOHN ZYDOK.

On Writs of Certiorari to the United States Courts of Appeals for the Ninth and Sixth Circuits.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

We will not here retrace the views expressed in the dissenting opinions, although these in themselves warrant rehearing. Reconsideration is also required, however, because of certain fundamental misconceptions in the Court's decision which are not dealt with by the dissents.

I. The Court's Misconception of Section 2 of the Internal Security Act.

The petitioners in these cases were charged in the deportation proceedings with being within a deportable class of aliens—persons who have been members of the Communist Party. The Court holds that aliens within this deportable class may be imprisoned without bail in the Attorney General's discretion as being security risks. It holds that the Attorney General may without more determine such aliens to be dangerous and therefore non-bailable because of Congress' findings in section 2 of the Internal Security Act.

Section 2 of the Internal Security Act deals with the "Communist movement" and "Communist organizations," the latter term being defined in section 3(3), (4), (5) of the Act. In order to match the findings in section 2 with the charge against the petitioners, the Court had to find that Congress was referring to the Communist Party of the United States in section 2. Otherwise, of course, there would be no relevance in considering section 2 with respect to the petitioners.

The Court supposes that by equating the Communist Party of the United States with a "Communist organization" under section 2 of the Act, it and the Attorney General are carrying out the purpose of Congress. The fact is, however, that this supposition and the Court's holding so far from carrying out the Congressional purpose thwart it. The Court has shown a fundamental misunderstanding of the Internal Security Act and its scheme.

The Internal Security Act is anti-Communist (and anti-democratic) legislation which establishes various controls and prohibitions which effectively outlaw organizations within its scope. Congress, however, felt that both public opinion and constitutional considerations were opposed to outlawing or restricting particular organizations by legislative fiat. It therefore made legislative findings in section 2 not about the Communist Party of the United States by name but about unparticularized "Communist organi-

zations." It then set up an administrative agency, the Subversive Activities Control Board, whose function is to determine, after hearing and on the basis of prescribed standards, just what organizations in the United States are "Communist organizations" within the meaning of section 2. See secs. 3(3), (4), (5); 12 and 13 of the Internal Security Act. It made the determinations of the Board subject to comprehensive judicial review, and provided that Board decision should not be final until such review had been exhausted. Sec. 14 of the Act.

Congress was aware that a politically-appointed Board, applying standards rigged by Congress, would determine that the Communist Party of the United States was a "Communist organization" referred to in section 2 of the Act, no matter what the nature of the evidence produced in the administrative hearing. At the same time, however, Congress was anxious to interpose the appearance of administrative determination after hearing in order to preserve a facade of due process. This fact appears not only from the scheme of the Act as a whole but also from its legislative history. Thus Representative Nixon, one of the authors of the bill which finally evolved into the Internal Security Act, and chairman of the legislative subcommittee of the House Committee on Un-American Activities, explained the bill as follows to the Senate Judiciary Committee:

> "We felt also that the Mundt bill, in its original form, was not the proper approach to the problem for two reasons. In the first place, the bill specifically named the Communist Party of the United States and attempted to build its definitions around the name of the Party. From having heard the witnesses before our committee, we came to the conclusion that naming the Communist Party by name and attempting to build the entire registration provisions around such a definition was an unconstitutional approach and consequently the committee attempted to find a legislative device for meeting the problem in a constitutional manner." (Hearings before Senate Committee on the Judiciary, 80th Cong., 2d Sess., on H. R. 5852, p. 40.)

The sponsoring House Committee explained the structure of the bill as follows:

> "To make membership in a specifically designated existing organization illegal per se would run the risk of being held unconstitutional on the ground that such an action was legislative fiat.
>
> "This legislation does not constitute a fiat. The Communist organization of the United States is not made guilty of any offense by reason of the enactment of the provisions of this act. If, however, the Communist organization of the United States or any other organization now in existence or to be formed operates in such a way that it comes within the definitions and performs activities which are proscribed under the act then the legislation will apply to it. If such organization changes its characteristics, then the objectives sought by the committee will have been accomplished." (H. R. Report No. 2980, 81st Cong., 2d Sess., accompanying H. R. 9490.)

At the present time, there has been no determination by the Subversive Activities Control Board that the Communist Party of the United States is a Communist organization within the meaning of the Internal Security Act. Currently the Board is conducting a hearing to determine if the Communist Party is such an organization. It has been taking testimony in this hearing since April 1951, and the Attorney General, who is the petitioner in the administrative proceeding has not yet completed his case. Decision by the Board is still far off, and, of course, judicial review of the Board's decision is even further off.

Congress' genteel substitute for a crude, outright legislative identification of the Communist Party with any Communist organization referred to in section 2 is, therefore, not yet operative. The administrative-hearing, judicial-review phases of the mechanism must still be finished.

The Court now completely wrecks the entire scheme and purpose of Congress. Congress was sufficiently sensitive to constitutional considerations and to public opinion to

fabricate a cloak of due process which might avoid the appearance of legislative attaint. The Court ruthlessly removes the cloak by holding that section 2 is a legislative reference to the Communist party of the United States *eo nomine*. It is possible that Congress' attempt to circumvent the bill of attainder prohibition may turn out to have been unsuccessful, but it is unquestionable that it intended to make the attempt and that the Court is frustrating Congress' purpose by ignoring the attempt and its features of administrative determination.

What is particularly perplexing is that Mr. Justice Clark should be a member of the majority which now disregards Congress' scheme by holding that section 2 makes legislative findings as to the Communist Party of the United States without reference to the administrative mechanism. In the passage we have quoted above from testimony of Representative Nixon, it is stated that the Committee decided to avoid specifically naming the Communist Party "from having heard witnesses before our committee" who pointed out that this would be "an unconstitutional approach." One of the witnesses to whom Mr. Nixon was referring was then Attorney General Clark, who testified as follows before the legislative subcommittee of the Committee on Un-American Activities:

> "A statute which would define the nature and purpose of an organization or group by legislative fiat is likely to run afoul of the due process requirements. The Congress cannot by statute presume a state of facts that is arbitrary or that attempts to prevent proof of true facts. This we call legislative fiat.
>
> * * * *
>
> "The fact that legislation may be subject to objection as being discriminatory cannot be overlooked. By singling out a political party or group for prohibitive legislation you may be charged with discriminatory action which would be objectionable as special legislation.
>
> "In this connection also, the protection against the passage by the Congress of any Bill of Attainder (Art.

1, 9, 3) is a most important consideration." (Hearings before Legislative Subcommittee, House Committee on Un-American Activities, Feb. 5, 1948.)

It is disconcerting to find that Mr. Justice Clark now overlooks the scheme which Congress set up in an effort to follow the advice he gave it as Attorney General.

The fact is that under the structure of the Act the only deportation provision which is to be matched with the findings of section 2 is not the provision expelling Communist Party members, but instead the provision expelling members of organizations required to register under section 7 of the Act (see sec. 22 of the Internal Security Act, adding subsection 2(E) to the October 16, 1918 Act). For, under the Act's scheme, the organizations referred to in section 2 are not supposed to be legislatively identified groups, but instead organizations who have been identified after an administrative process.

The Court has, therefore, blundered in supporting the Attorney General's refusal of bail to alleged members of the Communist Party on the basis that he has applied the legislative definition in section 2 of what are dangerous aliens. In addition, the only way in which dangerousness as a factor in bail discretion was imported into these cases was also through this misuse of section 2. Accordingly, section 2 cannot be used either to define petitioners' class as dangerous or to supply for that class a basis for importing the concept of dangerousness as a bail factor. This leaves as the only standards available to the Attorney General in applying bail discretion those normal standards which are outlined in *Stack* v. *Boyle*, 342 U. S. 1. These relate to assuring the presence of the accused and are obviously more than satisfied in the cases of petitioners.

This result also avoids the constitutional vice committed by the decision in authorizing preventive detention for reasons of domestic "security." The Court assumes that detention to prevent domestic misconduct is ancillary to the expulsion power. This assumption is, however, unfounded.

The only detention power which is ancillary to expulsion is the power to detain to insure availability of the alien. Detention for any other purpose obviously does not serve the expulsion purpose, and cannot be justified by it. If aliens can be preventively imprisoned, then so can citizens, because the source of power is not the jurisdiction over aliens but some other jurisdiction. Yet Mr. Justice Jackson has refused to permit detention for anticipated danger even after conviction. *Williamson* v. *United States*, 95 L. ed. 1379.

II. The Court's Misconception of the Government's List of Bail Cases.

The Court supports its conclusion that the Attorney General exercised discretion in cases of aliens charged with being Communists by stating that his report to the Court "shows allowance of bail in the large majority" of political deportation cases. This statement shows a misconception of the situation.

The fact is that the Immigration and Naturalization Service did decide to imprison without bail, and without exercising individualized discretion, all aliens charged with being or having been Communists, subject only to possible exceptions for aliens in ill health and aliens willing to "cooperate" with the Service by becoming informers. To carry out this decision, it did not, however, at one time rearrest all aliens under political charges. Instead, it first rearrested fifty such aliens, with the intention of following up this first onslaught with arrests of all other such aliens. It failed to follow up as planned not because it made a late switch to exercising discretion, but only because the courts made its plans futile by releasing all but five of the fifty who were so rearrested. See testimony of Chief of the Detention, Deportation and Parole Section, Immigration and Naturalization Service, quoted in Brief for Respondent in No. 136, p. 8. The number of enlarged aliens on the government's list does not, therefore, as the Court sup-

poses, demonstrate any exercise of discretion by the Immigration and Naturalization Service. It only reflects the fact that the courts would not tolerate the Service's refusal to exercise discretion.

III. The Court's Misconception in Passing on the Validity of the Deportation Statute.

The issue in these cases was whether the Attorney General could imprison the petitioners without bail pending the deportation proceedings. In supporting its decision on this issue, the Court went far afield to hold expressly that Congress could validly provide for the deportation of alien members of the Communist Party.

To us it seems clearly inappropriate for the Court in a bail proceeding to have considered the validity of the deportation statute under which the aliens are charged. We cannot believe that in a proceeding for bail for one indicted for larceny, the Court would have considered the constitutionality of the larceny statute. Since the validity of the substantive statute was not properly involved in these cases, a rehearing should be granted because the decision is in part predicated on an irrelevant consideration.

The inappropriateness of the Court's considering the validity of the deportation statute in a proceeding so removed from involving that issue is emphasized by the circumstance that the subject was decided without benefit of briefs and argument addressed to it. Yet it is undeniable that the question of validity poses serious constitutional problems which do not warrant the summary disposition made of them by the Court's opinion.

This deportation provision is the first in our history which makes cause for deportation membership in a specifically named organization without more. Obviously there looms large the issue of whether this unprecedented legislation constitutes a bill of attainder and a violation of due process and First Amendment rights.

The Court supports the validity of the deportation provision by referring to the power to deport anarchists. But the analogy is inappropriate, since Congress has not provided that members of a particular society should be deported on a legislative finding that the named society advocates anarchism as understood by Congress.

The Congress seems to hold that the Communist Party of the United States is an organization which advocates the forcible overthrow of the government, although the deportation statute independently proscribes membership in organizations of the latter description. It is well known that the Communist Party strongly disputes the charge that it advocates violence. For the Court to decide this factual question which was not litigated results in a judicial bill of attainder. Furthermore, the Court's conclusion is inconsistent with the one previous decision of the Court on this subject. *Schneiderman* v. *United States*, 320 U. S. 118.

IV. The Court's Misconception of the Scope of Its Decision.

The Court has held that Communists and former Communists may be held without bail because they are dangerous people. To us, as to Mr. Justice Black, it seems repugnant to the Constitution and to the principles of a free society that persons who have committed no crime may be imprisoned without bail because they are or were Communists. Particularly is this so when the persons are considered dangerous not because of anything they may do, but only because of what they may say—in the Court's words, "participating in the Party's indoctrination of others to the prejudice of the public interest."

But however we may deplore the fact, we recognize that a majority of the Court has consciously and deliberately ruled that alien Communists and former Communists are outlaws. We can not believe, however, that the Court would also consciously and deliberately decide that aliens who are not Communists are also outlaws. Yet such is the inescapable result of the Court's decision.

The Court's decision permits the Attorney General to imprison without bail aliens who never were members of or affiliated with any Communist organization merely on the basis of an incorrect accusation that they were members or affiliates. In the present cases, the returns to the writs of habeas corpus merely alleged that evidence in the files of the Immigration and Naturalization Service indicated that the petitioners had been Communists. Under contemporary conditions, it is perfectly apparent, however, that government investigative files are full of untrue "evidence" that innumerable persons were members of or "affiliated" with the Communist Party. Yet all the Immigration Service need do to justify imprisoning innocent aliens is to allege in returns to writs of habeas corpus that its files contain "evidence."

Two illustrations of the unreliability of the Service's "security" files come to mind. Ellen Knauff was accused on the basis of confidential files of the Immigration and Naturalization Service of being a security menace of the first order. See *Knauff* v. *Shaughnessy*, 338 U. S. 537. Yet the accusations were found to be completely baseless when, after great travail and with the assistance of members of Congress, she was able to obtain a hearing. In another episode, the distinguished foreign editor of the Nation, Julio Alvarez del Vayo, was recently imprisoned on Ellis Island on his return from covering a session of the U. N. General Assembly.

It is true that an alien has an opportunity to traverse the allegations of the Service's return to a writ. But this opportunity is of small value. If the alien files a traverse, he merely obtains a hearing on habeas corpus which inquires into the very fact which is charged in the deportation warrant. In this hearing, the alien has the burden of proof, and "the Attorney General's exercise of discretion" in refusing bail is, in the words of the Court, "presumptively correct and unassailable except for abuse." Furthermore, this burden the alien must carry before he has

been able to prepare for a hearing on the principal fact, and when, being imprisoned, he is least able to prepare and present his case. In this hearing, he must disclose his defense to an accusation before the accusing witnesses are placed on the stand, and he is effectively deprived of the privilege against self-incrimination. Finally, courts are under psychological pressures of great magnitude not to appear to reject claims of the Attorney General that the national security is at stake. To use again the analogy of a person indicted for larceny, it is as if the accused were imprisoned without bail until he proved his innocence. Such a procedure obviously makes a mockery of the right to bail, discretionary or otherwise.

The net result is that on the flimsiest, unsubstantiated evidence, the Attorney General may imprison without bail recklessly accused aliens who never were members of or affiliated with any radical organization. The Court's decision, therefore, is not merely anti-Communist; it is anti-alien.

Finally, the decision directly jeopardizes the liberty of citizens, as well as aliens. For it is a precedent not only as to bail in expulsion cases, but also as to the writ of habeas corpus generally. The Court has here held, in a decision which cannot logically be confined to alien expulsion cases, that the writ may be defeated merely on a showing of suspicious circumstances. It has thus vitiated one of the chief historic functions of the writ, the prevention of the tyranny of imprisonment merely on the basis of suspicions entertained by the government. *Ex Parte Watkins*, 3 Peters 193, 202.

CONCLUSION.

America owes an incalculable debt for the nourishment it has derived from the alien, radical and conservative. One of its greatest glories, eloquently expressed on the Statute of Liberty, is its tradition of welcome and political freedom for the oppressed and poor of foreign lands. This debt

and this tradition have been repudiated by the Court's decision. And because liberty is indivisible, the Court's decision has made our society less free for citizens and aliens alike.

The petition for rehearing should be granted.

Respectfully submitted,

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I certify that the within and foregoing petition for rehearing is presented in good faith and not for delay.

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